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# Is Natural Law Timeless?

JONATHAN CROWE\*

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*Natural law theories hold that human action is oriented towards certain intrinsic goods and governed by practical principles accessible to us by virtue of our nature. These goods and principles make up the content of natural law. This essay argues that both the content of natural law and our understanding of its requirements evolve throughout human history. This represents a diachronic, rather than synchronic, understanding of natural law. This perspective is contrasted with the ‘new natural law theory’ of Germain Grisez and John Finnis, which depicts natural law as timeless and unchanging. Finnis seems to think that natural law does not change because it exists in the mind of God; however, a belief in God as the source of natural law is equally consistent with a diachronic perspective. I defend this view through reference to the writings of Thomas Aquinas and the structure of the biblical narrative.*

Natural law theories hold that human life is directed towards certain intrinsic goods suited to our nature. Our engagement with these goods is governed by our human capacity for reflection and, as such, by what the ‘new natural law theorists’, such as Germain Grisez and John Finnis, call ‘principles of practical reasonableness’.<sup>1</sup> It is these goods and principles that make up the ‘natural law’ that gives such theories their title. A central question confronting natural law theories is therefore where these goods and principles come from. It often appears, on a casual reading of both classical and contemporary natural law theorists, as if they come out of nowhere. Natural law is presented as if it were (in the words of Oliver Wendell Holmes) a ‘brooding omnipresence in the sky’<sup>2</sup>—a set of timeless, unchanging principles received fully-formed from above.

The work of Grisez and Finnis does little to dispel this perception. Finnis’s account of natural law, in particular, is based on a set of basic goods—such as life, knowledge, friendship, play and religion—that he

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<sup>1</sup> See, for example, Germain Grisez, *The Way of the Lord Jesus: Christian Moral Principles* (Franciscan Press, 1983) 121–2; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2011) ch 5.

<sup>2</sup> *Southern Pacific Company v Jensen*, 244 US 205, 222 (1917).

characterises as self-evident, indemonstrable and underived,<sup>3</sup> along with a collection of principles of practical reasonableness that are analogous to mathematical principles and therefore, as he puts it, ‘have no history’.<sup>4</sup> Finnis draws a distinction between theories of natural law, which form part of the history of ideas, and natural law itself, which he contends is ahistorical. Why, then, does Finnis talk about natural law in this way? Where, in particular, does he think its content comes from? The answer seems to be that he thinks natural law comes directly from God: it ‘express[es] aspects, intelligible to us, of [God’s] creative intention’.<sup>5</sup> This might seem, at first, to explain why he regards it as timeless.

Further reflection, though, reveals this explanation as inadequate. If Finnis’s ahistorical view of natural law is attributable to his belief that natural law comes from God, this must be because he thinks God works in the world in a particular way. Specifically, this approach suggests what I will call a *synchronic* view of God’s agency. The precepts of natural law, on this view, are timeless because they exist in the mind of God, but they are also accessible to human reason. It follows that they are fully embodied in the natural world when the faculty of reason comes into being—when the first humans are created or, perhaps, when they obtain knowledge of good and evil.<sup>6</sup> This, however, is not the only possible way of thinking about God’s way of creating natural law; indeed, I want to suggest it is not even a very biblical way of doing so.

I begin by outlining an alternative account of natural law that depicts it as taking shape progressively throughout human history. Natural law, on this view, reflects ongoing human efforts to work out how best to cooperate and flourish in our changing natural and social environments. Next, I draw support for this perspective from the writings of Thomas Aquinas, who is widely regarded as the paradigmatic natural law theorist.<sup>7</sup> Aquinas expressly affirms that natural law can change; this reflects his distinction between eternal law, which reflects God’s unchanging design, and natural law, which is accessible by human reason. Finally, I argue there is biblical support for an evolutionary conception of natural law. The biblical narrative is consistent with a *diachronic* view of God’s agency, where God’s plan reveals itself gradually over time.

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<sup>3</sup> Finnis (n 1) 33-4, 64-9.

<sup>4</sup> Ibid 24.

<sup>5</sup> Ibid 389-90.

<sup>6</sup> Genesis 3:5-6.

<sup>7</sup> See, for example, Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 1.

## I Natural Law in Human History

What more can we say, then, about where natural law comes from? Must we regard it as arising fully formed at the start of human history? My recent book, *Natural Law and the Nature of Law*,<sup>8</sup> offers an alternative to Finnis's view on this issue. This alternative rejects the idea that natural law is outside history. Rather, I argue that natural law is objective and normative, but nonetheless socially embodied, historically extended and dependent on contingent facts about human nature.<sup>9</sup> Principles of natural law reflect the ongoing human quest to work out how best to live flourishing, fulfilling lives given the nature we have and the social worlds we inhabit.

First, natural law is *socially embodied*. This is true in both epistemological and ontological senses. The way we discover the nature of the basic goods and principles of practical reasonableness that comprise natural law is by interpreting social practices. We will generally start by looking at practices in our own community, asking what goals we value for their own sake and what constraints we place on practical reasoning. We will then compare these ideas to our intuitions about specific cases and perhaps also the practices of other communities that we know about.

It is by looking beyond our own community and considering human societies in general that we can potentially identify goods and principles that are common to humans as a whole. This kind of inference works two ways. First, it is by observing different communities that we form knowledge about what values and principles are universal and not merely relative to one's own society. Second, it is the fact that natural law provides normative guidance for humans in a range of diverse settings that makes it natural law in the first place. Our investigation into social practices therefore potentially bolsters our confidence in the objectivity of value.

Second, natural law is *historically extended*. Human history is, at least in part, the story of the human quest to work out how best to live flourishing and fulfilling lives in a range of different—and more or less challenging—natural, social and economic environments. This is not knowledge that can be gained or processed all at once. Rather, it is something that human communities have struggled to work out over time. The precepts of natural law, in this sense, are the product of a process of social evolution and human discovery stretching over multiple generations. We learn what works and what doesn't work through a social and historical process of trial and error.

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<sup>8</sup> Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019).

<sup>9</sup> Ibid 5-8.

Our grasp of natural law, in this sense, changes and grows with our self-understanding. More fundamentally, however, natural law itself changes as it adapts itself to our changing environments. The best way of living a fulfilling and harmonious life in centuries past may not be the best way of doing so today. A helpful distinction can be drawn here between the fundamental precepts of natural law, which change relatively little, and their applications to specific existential and social questions, which may change significantly depending on the circumstances and context. However, to maintain that the precepts themselves are entirely unchanging is, I think, to overlook the massive shifts that have occurred in the course of human history.

The good of friendship gives a striking example.<sup>10</sup> Finnis uses this idea very broadly to cover everything from intimate relationships to social bonds within a community.<sup>11</sup> It can hardly be denied, however, that the human concept of community has changed very fundamentally over time. Human societies were once structured around families and tribes, whereas now we organise ourselves by nations (and even supra-national communities like the European Union). This massive shift in the nature of communities has also radically changed how we live together within them. This seems to be a change in the central facets of natural law, not merely its details.

A deeper question is whether we can reliably know the fundamentals of natural law except by way of its detailed applications. Natural law, unlike the revealed law of scripture, is known to us through reason. Our capacity for reason, in turn, is exercised through engagement with our social environment. We come to know the natural law only by working through practical dilemmas and thereby gaining knowledge of the most reliable ways to advance human flourishing. This socially embodied and historically extended process of reasoning reveals to us unchanging components of natural law, such as the prohibition on murder. However, even with respect to these fundamental precepts, it is misleading to say that they ‘have no history’.

Third, natural law (as the name suggests) *depends on facts about human nature*. Our nature as humans is partly a product of our biology. However, it is also a product of our social environment. Natural law instructs us in the best way to live flourishing lives given the nature we have and the environment we inhabit. It follows from this that if human nature was significantly different, then natural law would also be different. Human nature, however, is at least partly contingent, in the sense that it logically could have been otherwise. Indeed, if we accept that human nature changes with shifts in our social environment, it follows that our nature has changed throughout our history.

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<sup>10</sup> Ibid 27-30.

<sup>11</sup> Finnis (n 1) ch 6.

All these factors indicate that natural law cannot be adequately understood in an ahistorical way. A potential worry about this conception of natural law is that by emphasising its responsiveness to social and historical conditions, we thereby undermine its objective and normative character. However, I think this worry is misplaced. I suggested previously that by observing the practices of different human communities we can more accurately identify those fundamental values and normative principles that humans have in common. All human communities, we can observe, place value on life, health, friendship, play, meaning and reasonableness, although the exact form this takes differs from context to context. These universal values, then, have a plausible claim to be regarded as objective components of human flourishing.<sup>12</sup>

It might be objected that this methodology violates the separation between fact and value famously pointed out by David Hume.<sup>13</sup> However, the suggestion is not that the values and principles common to human communities are normatively binding because they are found in different social settings. Rather, the fact they are found in different societies provides plausible evidence that they are conducive to human flourishing.<sup>14</sup> It would be surprising if human social evolution, over a long period and across a variety of diverse natural and social environments, did not select for precepts that are at least presumptively valuable as guides to human behaviour.

## II Natural Law in Aquinas

The picture of natural law I have outlined has some important advantages over Finnis's theory. The most important of these, to my mind, is that it enables us to engage constructively with the question of where the content of natural law comes from. The idea that natural law comes into being fully formed independent of history makes it difficult to engage in reasoned disputes about its content, particularly if people also have different intuitions about specific issues or cases. The account I develop in my book, by contrast, enables us to place natural law within a broader discussion about the evolution of social practices and how they promote the goal of human flourishing.

Further support for this account of natural law, I suggest, can be drawn from Aquinas. Grisez and Finnis depict their views as an interpretation of Aquinas;<sup>15</sup> for this reason, Finnis prefers the label

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<sup>12</sup> For a detailed account of the basic forms of human flourishing, see Crowe (n 8) ch 2.

<sup>13</sup> David Hume, *A Treatise of Human Nature* (Clarendon, 1978) 469-70 (bk III, pt I, § I).

<sup>14</sup> Compare Finnis (n 1) 33-4.

<sup>15</sup> Grisez (n 1) xxviii; Finnis (n 1) vi.

‘new classical natural law theory’.<sup>16</sup> However, unlike those authors, Aquinas explicitly embraces the idea that natural law can change over time. Question 94, Article 5 in the First Part of the Second Part of the *Summa* is entitled ‘Whether the natural law can be changed?’ Aquinas’s response is a clear ‘yes’:

A change in the natural law may be understood in two ways. First, by way of addition. In this sense, nothing hinders the natural law from being changed: since many things for the benefit of human life have been added over and above the natural law, both by the Divine law and by human laws. Secondly, a change in the natural law may be understood by way of subtraction. ... In this sense, the natural law is altogether unchangeable in its first principles: but in its secondary principles ... it may be changed in some particular cases of rare occurrence, through some special causes hindering the observance of such precepts.<sup>17</sup>

Aquinas, then, holds that the fundamentals of natural law do not change. However, its details can and do change. This may be because God grants us additional revelation on how best to lead flourishing lives, as occurs regularly throughout the Bible. It may also be because human laws and social conventions give different shape to natural law at different points in history. Aquinas makes it clear that these changes in the social environment can change the natural law itself, by dictating the contours of social life. They specify details of human flourishing that would otherwise be indeterminate.

Aquinas therefore affirms that the natural law may change by way of addition. He generally denies that it can change through subtraction: that is, the primary precepts of natural law admit of no exceptions and the secondary precepts derived from them rarely do so. However, he nonetheless recognises that exceptional circumstances may arise where what appears to be a well worked out consequence of the first principles of natural law does not apply. Our understanding of natural law may evolve over time in response to particular cases, even to the extent of creating exceptions to what were previously understood as general requirements. This point, too, recognises the relevance of human circumstances in defining the content of natural law.

Aquinas, as many readers will recall, identifies four main types of law in the *Summa*: eternal law, natural law, human law and divine law.<sup>18</sup> Eternal law, as the name indicates, does not change, since it is a supreme

<sup>16</sup> John Finnis, ‘Reflections and Responses’ in John Keown and Robert P George (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford University Press, 2013) 459, 468–69 n 31.

<sup>17</sup> Thomas Aquinas, *Summa Theologiae* (Dominican Fathers trans, Ave Maria, 1948) I-II, q 94, art 5. For helpful commentary, see J Budziszewski, *Commentary on Thomas Aquinas’s Treatise on Law* (Cambridge University Press, 2014) 282–3.

<sup>18</sup> Aquinas (n 17) I-II, q 91.

idea [*Ratio*] existing in the mind of God.<sup>19</sup> Natural law, however, is that part of the eternal law governing human conduct accessible through human reason,<sup>20</sup> while divine law is that part of the eternal law governing human conduct revealed to us through scripture.<sup>21</sup> Aquinas denies that humans can possess direct or complete knowledge of the eternal law: ‘no one can know the eternal law, as it is in itself, except the blessed [in Heaven] who see God in His essence. But every rational creature knows it in its reflection, greater or less’.<sup>22</sup> The basic precepts of natural law, by contrast, are accessible and ‘equally known by all’.<sup>23</sup>

Aquinas’s distinction between knowledge of eternal law and knowledge of natural law can be understood as manifesting what my collaborator, Constance Youngwon Lee, aptly terms ‘a dialectic of dual perspectives’.<sup>24</sup> The whole of eternal law exists perfectly in the mind of God. Human knowledge, by contrast, is drastically limited by our fallen nature. Nonetheless, for Aquinas, we still have sufficient reasoning abilities to access the fundamental precepts of natural law. Natural law, then, is a concept defined by reference to the limitations of human reason; it exists precisely so that humans, despite our inherent fallibility and depravity, can nonetheless access truths about human flourishing and be held accountable before God for our actions.

Aquinas’s presentation of these issues makes central use of the distinction between the fundamental precepts of natural law and its detailed applications. I suggested earlier that even the basic precepts of natural law may sometimes change with radical shifts in human social organisation. Furthermore, our knowledge of these precepts, like that of secondary applications, occurs through a historical process of accumulated human wisdom. Natural law as a whole is therefore best understood as a product of human social evolution, even though some of its principles may prove to be unchanging. The same mode of discovery applies to both its primary and secondary dimensions.

### III Natural Law in the Biblical Narrative

I suggested previously that one possible explanation of why Finnis sees natural law as timeless is that he thinks it comes directly from God. We can now see why this explanation is inadequate; indeed, the divine origins of natural law support the opposite conclusion. Finnis’s conception of natural law, as I said before, seems to imply a *synchronic*

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<sup>19</sup> Ibid I-II, q 93, art 1.

<sup>20</sup> Ibid I-II, q 94, art 4.

<sup>21</sup> Ibid I-II, q 91, art 4.

<sup>22</sup> Ibid I-II, q 93, art 2.

<sup>23</sup> Ibid I-II, q 94, art 4.

<sup>24</sup> Constance Youngwon Lee, ‘The Spark that Still Shines: John Calvin on Conscience and Natural Law’ (2019) 8(3) *Oxford Journal of Law and Religion* 615, 615.



view of God's agency, where the precepts of natural law are embodied in human reason at a certain point and remain unchanged thereafter. This is, however, far from the only possible way of thinking about how God acts in the world. God, after all, is responsible for creating everything in the universe, including human institutions and history. It therefore seems at least possible that God intends natural law to be progressively shaped and discovered by humans through these social and historical processes.

God, on this view, does not create or reveal natural law independently of human actions. Rather, God's plan for human flourishing unfolds itself over time. This view of God's agency is not without biblical foundations. Natural law in the Old Testament takes one form for Adam and Eve,<sup>25</sup> another for Noah and his descendants,<sup>26</sup> another for Abraham<sup>27</sup> and yet another for Moses and Aaron.<sup>28</sup> The biblical people of Israel are chosen by God, but natural law is not revealed to them all at once. Even the Ten Commandments do not give a complete blueprint for society.<sup>29</sup> Rather, they experiment with different laws and forms of governance, adapting them to the needs of the time, and often making serious mistakes for which God must bring them to account.

Codes of law are promulgated and associated with detailed rituals for purification and atonement.<sup>30</sup> Some laws seek to preserve physical health and social harmony to enable social co-existence and ensure the survival of the group.<sup>31</sup> Other laws create internal standards of excellence to facilitate social virtue and belonging.<sup>32</sup> The apparatus of law, however, leads to its own challenges. Power accrues in members of the community who are blamed when things go badly.<sup>33</sup> Different forms of legal authority and governance are tried in response to different historical conditions.<sup>34</sup> The most successful rulers are wise and humble and unified the people. However, all are fallible.<sup>35</sup>

The biblical passages cited above all concern positive or specially revealed law, rather than natural law as such. However, all these biblical examples of positive law, insofar as they reflect God's plan for Israel,

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<sup>25</sup> Genesis 2:16-17; 3:1-5.

<sup>26</sup> Genesis 6:13-22; 7:1-5; 9:1-17.

<sup>27</sup> Genesis 15; 17:1-14.

<sup>28</sup> Exodus 12:1-23, 43-9; 20-3.

<sup>29</sup> Exodus 20:1-17.

<sup>30</sup> Exodus 20-3; Leviticus 1-27.

<sup>31</sup> See, for example, Leviticus 11:15; 17:10-16; 18.

<sup>32</sup> See, for example, Exodus 25-30.

<sup>33</sup> Numbers 11:1-15; 12; 14:1-12.

<sup>34</sup> See, for example, Exodus 18:13-26; Numbers 11:16-30; Judges 2:16-23; 1 Samuel 8:1-22.

<sup>35</sup> See, for example, Exodus 4:10; Numbers 11:14; 2 Samuel 24:10.

must at least be consistent with natural law. Aquinas seems to view them as *continuous with* natural law; both positive and revealed law, for him, can bring about changes in natural law by specifying its details. If natural law is discovered, as I suggested above, through its socially embodied manifestations, then the diverse forms that positive and revealed law take throughout the biblical narrative provide evidence for natural law's historically embedded character.

The biblical story then culminates in the person of Jesus, who offers a new understanding of the law. However, he does not come to sweep away the old law, but rather to fulfil it.<sup>36</sup> The fulfilment of the law is thus enacted through an embodied human being with a life and a history of his own, as well as a unique place in the history of humanity as a whole. It is through this socially embodied and historically extended process of becoming more fully human that we fulfil the natural law or enter the Kingdom of God. The Kingdom of God, Jesus says, is not over here or over there, but among us.<sup>37</sup> It is 'like a grain of mustard seed that a man took and sowed in his garden, and it grew and became a tree, and the birds of the air made nests in its branches'.<sup>38</sup> Its fulfilment is not to be found at some past point in history, but rather in the promise of a future to come.

The biblical narrative, then, seems consistent with a *diachronic* (rather than *synchronic*) view of God's agency, where God's plan unfolds progressively over time. It is, of course, true that from God's perspective natural law is still timeless and unchanging, because God is omniscient and exists outside of time. However, emphasising this perspective, as Finnis seems to do,<sup>39</sup> neglects the distinction between eternal law and natural law developed by Aquinas. Natural law theory is best understood as an account of what is good and reasonable *for humans*.<sup>40</sup> It serves as a guide for human action in our social and historical predicament. It makes most sense, then, to consider the content of natural law from a human point of view. Humans, unlike God, have limited knowledge and exist within time. Natural law, for us, takes shape in a diachronic way.

A belief in God as the ultimate source of natural law therefore does not, by itself, support the conclusion that natural law is timeless and unchanging (at least when considered from a human perspective). God, of course, exists outside of time; from God's perspective, then, natural law (like all of creation) is timeless. However, God has created natural law specifically for the direction of humans. It differs in this respect, as

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<sup>36</sup> Matthew 5:17.

<sup>37</sup> Luke 17:21.

<sup>38</sup> Luke 13:19 (ESV).

<sup>39</sup> See, for example, Finnis (n 1) 390.

<sup>40</sup> Crowe (n 8) 33-4.

Aquinas recognised, from the scientific laws that God has ordained for the broader physical workings of the universe. From God's perspective, there is (in a sense) no natural law; there is only eternal law. Everything is known. From our human perspective, however, many things are not known and cannot be known. Insofar as they are known, it is only by the grace of God. And it may be that God reveals them to us only one piece at a time—or reveals them differently at different times and in different places.